BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GERALD GILLETTE Claimant	)	
VS.	)	Docket No. 1,016,102
SUPERIOR INDUSTRIES INTERNATIONAL Self-Insured Respondent	)	

ORDER

Respondent requested review of the November 4, 2005 Award by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on February 7, 2006.

APPEARANCES

Kala A. Spigarelli, of Pittsburg, Kansas, appeared for the claimant. Troy A. Unruh, of Pittsburg, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument the parties agreed to the following:

1. The evidentiary issues discussed in the Award and the parties' briefs are no longer in dispute;

2. Claimant no longer contends he is permanently and totally disabled;

3. The only evidence as to claimant's task loss is 33 percent; and

4. The 14.5 percent permanent partial whole body impairment assessed by the ALJ is no longer in dispute and should therefore be affirmed.

ISSUES

The only issue for purposes of this appeal is the nature and extent of claimant's permanent partial general (work) disability under K.S.A. 44-510e(a). The ALJ awarded claimant a 45 percent work disability based upon a 33 percent task loss and a 57 percent wage loss.

Respondent argues claimant is not entitled to any work disability as he returned to a job that fell within the treating physician's restrictions and pays a comparable wage. Respondent further contends claimant's refusal to continue in that light duty position constitutes a lack of good faith, thereby precluding him from any monetary recovery beyond the value of his functional impairment.

Claimant maintains he attempted the accommodated position in good faith, but after a few months, the work began to take its toll and caused his low back complaints to increase. When he sought treatment from his personal physician, he was advised to cease working. And when that release was provided to respondent, his employment was terminated. Claimant has not made any effort to find subsequent employment and maintains he is incapable of working. Accordingly, claimant requests the Board affirm the ALJ's finding of a 45 percent work disability.

The only issue to be decided in this appeal is claimant's entitlement to work disability, above the value of his functional impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant sustained a compensable injury on March 9, 2004, while working for respondent. This accident aggravated his pre-existing arthritis and spondylolisthesis in his low back, primarily at L5-S1. He is not a surgical candidate, due in part to his physical size and ongoing problem with deep vein thrombosis. All of claimant's treatment has been conservative in nature and as of July 19, 2004, he was released to return to work by Dr. Randall Hendricks, the treating physician, and was instructed to continue with the restrictions assigned previously. These restrictions include no lifting over 20 pounds, limit bending and twisting and alternate standing and sitting.[1]

When Dr. Hendricks released claimant with the above referenced restrictions, claimant was provided with a light duty job in the paint room. This job required him to use a brush to break off any excess paint from the wheels as they passed by his station. Claimant believed he could perform this job within his restrictions. In order to do this job he fashioned a stool out of paint buckets upon which he could sit while performing the job. He could not sit all the time and was continually required to stand up to rotate the tires in order to complete his job task, cleaning off paint from both sides of the wheels. According to claimant, this maneuver required him to twist and bend in order to ensure all of the excess paint was removed from the wheel.

[1] Hendricks Depo., Ex. 2 at 5 (p.2 of June 11, 2004 report).

Initially claimant thought this position would suit his needs. However, over the course of time he began to have increased pain in his low back. He went to see his personal physician, Dr. Neal R. Brockbank, who told him he should stop working as it was aggravating his condition. This recommendation was memorialized in a letter and given to respondent. Within a day or two, claimant's employment was terminated. Since that time he has not worked, has not looked for work, and now receives social security disability.

At the regular hearing, the nature and extent of claimant's work disability was a primary issue. Because claimant's injury comprises an "unscheduled" injury, his permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e. That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

The Kansas Appellate Courts have interpreted K.S.A. 44-510e(a) to require workers to make a good faith effort to continue their employment post injury. The Court has held a worker who is capable of performing accommodated work should advise the employer of his or her medical restrictions and should afford the employer a reasonable opportunity to adjust the job duties to accommodate those restrictions. Failure to do so is evidence of a lack of good faith.[2] Additionally, permanent partial general disability benefits are limited to the functional impairment rating when the worker refuses to attempt or voluntarily terminates a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage.[3]

The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis.[4] An employee may be entitled to a work disability

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[2] See, e.g., *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999), and *Lowmaster v. Modine Mfg. Co.*, 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* 265 Kan. 885 (1998).

[3] *Cooper v. Mid-America Dairymen*, 25 Kan. App. 2d 78, 957 P.2d 1120, *rev. denied* 265 Kan. 884 (1998).

[4] *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, 9 P.3d 591 (2000).

after seeking other employment when the injury prevents him or her from continuing to perform his or her job duties for the employer.[5]

The ALJ concluded claimant attempted, in good faith, the accommodated job provided to him. The ALJ specifically noted that claimant did his best to perform his paint room job, but he was simply unable to perform the job without significant pain.[6] Thus, the ALJ rejected respondent's contention that claimant demonstrated a lack of good faith when he failed to continue working in the paint room.

The Board has considered respondent's arguments with respect to claimant's lack of good faith in failing to continue in his position in the paint room and finds the ALJ's findings should be affirmed. Claimant gave far more than a token effort in his attempts to perform the accommodated work duties assigned to him working for at least 3 months. While it would have been better or preferable had claimant requested further accommodation before resorting to seeking treatment outside his workers compensation claim, with Dr. Brockbank, and then presenting that work release to his employer, like the ALJ, the Board does not find that his conduct constitutes a lack of good faith.

When claimant's personal physician took him off work respondent made no effort to find alternative placement within its facility, or to send claimant for a second evaluation with the treating physician to better ascertain his work status. Dr. Brockbank certainly indicates that it was the back condition, and not deep vein thrombosis, which was compromising claimant's ability to work. Logically, respondent could have easily referred claimant to a physician for a second opinion, a functional capacities evaluation, or considered further modifications to claimant's job duties. None of these things were done.

Under these facts, the Board finds that claimant demonstrated a good faith attempt to perform the job offered to him, but was not able to tolerate it. Accordingly, the ALJ's decision not to impute the comparable wages paid to claimant in the paint room position, and thereby limit his recovery to the functional impairment rating, is affirmed.

This finding of good faith does not alleviate claimant's ongoing obligation to look for alternative employment upon his termination. It is uncontroverted that since leaving his job with respondent claimant has not looked for work. Although his counsel suggests that he is simply incapable of doing so, there is no evidence within the record to support that contention. Jerry Hardin, claimant's vocational expert, testified that claimant was capable of earning $280 per week. Absent any other evidence, the ALJ imputed this figure to claimant and concluded claimant sustained a 57 percent wage loss. And when averaged with the only opinion as to task loss, 33 percent, the resulting figure is 45 percent, which was awarded by the ALJ.

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[5] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P. 2d 288, *rev. denied* 267 Kan. 889 (1999).

[6] ALJ Award (Nov. 4, 2005) at 5.

The Board finds claimant is capable of substantial gainful employment and the ALJ's decision to impute the $280 wage offered by Jerry Hardin should be affirmed. Claimant has made no effort to find employment since he was terminated. He is required to do so under the *Foulk* and *Copeland* case law and his failure to do so authorizes the finder of fact to impute a wage based upon the evidence contained within the record as to claimant's ability to earn wages. Here, the parties concede the only evidence is that claimant is capable of earning $280 per week, which translates to a 57 percent wage loss.

Having affirmed the 57 percent wage loss and there being no dispute as to the 33 percent task loss, the ALJ's 45 percent work disability finding is hereby affirmed.

All other findings and conclusions within the ALJ's Award are hereby affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated November 4, 2005, is affirmed

IT IS SO ORDERED.

Dated this _____ day of February, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Kala A. Spigarelli, Attorney for Claimant
Troy A. Unruh, Attorney for Self-Insured Respondent
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director